Filed 8/3/12 P. v. Chen CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KATHY YUAN CHEN, Defendant and Appellant.	G044518 (Super. Ct. No. 09CF1208) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal; Law Office of I. Mark Bledstein, I Mark Bledstein and Adam M. Koppekin for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Julie L. Garland, Assistant Attorneys General, A. Natasha Cortina and Heidi T. Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

In this case involving fraudulently arranged subprime real property loans, a jury convicted defendant Kathy Yuan Chen of 48 counts of grand theft (Pen. Code, § 487, subd. (a));[1] 36 counts of forgery (§ 470, subd. (b)); 28 counts of recording false documents (§ 115, subd. (a)); 16 counts of identity theft (§ 530.5, subd. (a)); four counts of forgery of official seals (§ 472); three counts of filing false tax returns (Rev. & Tax. Code, § 19705, subd. (a)(1)); and one count each of conspiracy (§ 182, subd. (a)(1)), attempted grand theft (§§ 664, subd. (a), 487, subd. (a)), and elder theft (§ 368, subd. (d)). The jury found true many instances of the white collar crime enhancements that: (1) defendant committed a pattern of related felony conduct involving the taking of over $500,000 (§ 186.11, subd. (a)(2)), and (2) she caused property losses of over $2.5 million (§ 12022.6, subd. (a)(4)). The court sentenced her to a total prison term of 67 years.

On appeal defendant contends: (1) the court erred under section 654 by failing to stay execution of sentence on her forgery convictions; (2) the court erroneously failed to instruct the jury that certain borrowers were accomplices as a matter of law whose testimony required corroboration; and (3) the court improperly allowed the People to amend the information during trial. We affirm the judgment.

FACTS

In the space of two and one half years (from 2005 through 2007), defendant prepared the documentation for 47 subprime loans totaling more than $17.5 million from 13 lenders on 35 real properties. Defendant profited from the transactions by diverting some of the loan proceeds to her own personal use without the consent of the borrowers or the lenders.

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[1] All statutory references are to the Penal Code unless otherwise stated.

By definition, subprime loans are made at high interest rates to borrowers who cannot qualify for conventional loans. Defendant was the borrower in only four of the 47 loans. As to the other loans, most of the borrowers were of Hispanic descent, spoke little or no English, were unemployed or had limited income, and/or had little education or ability to read. Some were unaware that defendant bought and sold properties in their names. Some were "straw buyers," who agreed, in exchange for payment, that properties could be bought and sold in their names. Other borrowers believed they were actually purchasing houses or refinancing their homes. Most purchase transactions involved 100 percent financing of the property, so that the borrower had no out-of-pocket costs. All of the loans were purportedly for owner-occupied properties, with the borrower promising the lender to live in the home.

Defendant forged borrowers' signatures on some documents, as well as forging or falsifying a notary's signature and seals. The forged or falsified documents included promissory notes, grant deeds, quitclaim deeds, deeds of trust, and loan applications. On documents where defendant did not forge signatures, she instructed the borrowers to sign the paperwork without giving them a chance to read the documents and without explaining what they were signing. She used the borrowers' social security numbers and driver's license numbers to apply for the loans, sometimes without their consent. She promised to pay substantial sums of money to some borrowers, but failed to do so.

Defendant submitted loan documents to lenders which misrepresented the financial status of the borrowers. Sometimes she inflated the borrower's income and assets. For some borrowers she created fictitious businesses, obtained business licenses, and altered the licenses to show a lengthy business history. If the lenders had known about the forgeries or misrepresentations, they would *not* have made the loans.

In November 2007, Ron Frazier, an investigator with the district attorney's major fraud unit, learned of, and began investigating, defendant's loan fraud. Pursuant to

search warrants, he seized defendant's bank account records for the period from late 2004 to early 2008, as well as documents from lenders and title insurance companies. He uncovered hundreds of fraudulent documents. He discovered that most of the real estate securing the loans was now vacant and in foreclosure.

Frazier interviewed defendant extensively. Defendant said that in 2003, she was a real estate agent and met Richard Gonzalez who was selling his home. In 2004, Gonzalez proposed that he and defendant work together in real estate: he would find buyers and sellers and she would prepare all the associated paperwork.[2] At Gonzalez's suggestion, defendant obtained a real estate broker's license. She also obtained a notary public license. She created the following entities: Western Escrow, an escrow company; Chen Financial, a brokerage business; S.B.C. Financial, another brokerage business; K.C. Realty, for listing homes; and Nationwide Tax Service.

Because she owned an escrow company,[3] defendant was able to divert loan proceeds to her personal accounts, as well as to Gonzalez. Ultimately, from the total loan proceeds of over $17.5 million, defendant diverted $2.75 million to her personal use (of which she gave $636,000 to Gonzalez). She also used loan proceeds to make mortgage payments on other houses to prevent quick foreclosures that might "red flag[]" her in the lenders' eyes.

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[2] Gonzalez's brother also brought in clients. The original and amended complaints charged defendant and the Gonzalez brothers as codefendants. All references in this opinion to "Gonzalez" refer to Richard Gonzalez.

[3] An escrow agent is a neutral third party who is supposed to pay out the mortgage loan proceeds as directed by the parties to the transaction. Depending on the lender's policy, loan funds either flow (1) directly to the escrow company, or (2) to the title company, which pays liens on the property and then transfers the balance to the escrow company. (See generally Fin. Code, § 17003.)

DISCUSSION

Section 654 Challenge to Forgery Sentences

Defendant contends the court should have stayed, under section 654, execution of sentence on the prison terms (totaling 24 years) it imposed for her forgery convictions under section 470, subdivision (b). We requested and the parties submitted supplemental briefing on this issue.[4] Defendant asserts her forgery crimes and the corresponding grand theft offenses arose "out of the same transactions" — transactions "in which the forged documents were used to improperly obtain money from third party lenders in connection with fraudulent real property loans." She argues the forgeries were "a means of facilitating the thefts," committed with a single "criminal intent — i.e., to steal money."

The Attorney General counters that the court did not err, because "the forgeries involved separate victims, separate harms, and/or were divisible in time and location from the grand thefts." She argues "the forgeries were distinct crimes with a separate intent." She asserts that the victims of the forgeries were individual borrowers who were separate and distinct from the lender bank victims of grand theft. She argues "each forgery victim suffered their own hardship and loss due to the forgery, i.e., loss of their life savings and foreclosure on their homes." She further states that "the grand nature of [defendant's] criminal fraud — stealing over 17 million dollars from financial institutions with the use of forged documents of unsuspecting victims, clouding property

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[4] Defendant also challenges (in brief footnotes in her opening brief) the court's failure to stay execution of sentence on her elder theft, forgery of an official seal, identity theft, and recording false documents convictions. She failed to discuss any of these additional convictions in her supplemental brief, however, and failed to provide any argument or analysis as to these particular offenses in any of her briefing, and has therefore waived the issue. (*People v. Jones* (1998) 17 Cal.4th 279, 304 [a claim presented perfunctorily and without supporting argument will be rejected by the court in similar fashion].)

title, credit and/or the reputation of the victims of the forgeries — makes her more culpable, not less, and she was properly punished more severely accordingly." She concludes the "trial court's determination that [defendant] should be punished for the separate crimes of forgery and for grand theft should be upheld because sufficient evidence supported the implicit finding that each count was committed with separate intents and objectives, were against separate victims, and/or were divisible in time and location."

Defendant replies that the harm suffered by borrower victims "might have some relevance if [defendant] had been charged with separate counts of theft as to those persons or entities — thereby bringing her within the 'multiple victims' situation[, but] it has no conceivable bearing in this case." She argues that "section 654 is concerned with the *intent* of the defendant, rather than the *effects* of his or her actions, and there is no showing [she] harbored a separate criminal intent to harm those persons that was not merely incidental to her overriding goal of obtaining money from the lenders." Defendant describes the harm suffered by borrowers as "collateral damage" resulting from her single intent of stealing money.

The Sentencing Proceedings Below

In their sentencing memorandum, the People devoted 12 pages to a discussion of the application of section 654 to this case, arguing that the court should stay execution of sentence only on defendant's conspiracy conviction. As to her forgery convictions under section 470, subdivision (b), the People argued, inter alia, that each "forgery conviction involved a separate document with a separate victim on a separate date."

Defense counsel argued: "The court has the authority to sentence the defendant to a consecutive sentence as to each of the larger transactions, i.e.: One sentence for each false application for a loan. This is all that is permitted under" section

654. "[E]ach loan application was an attempt[ed] or completed grand theft and the accompanied forgeries, identity theft, etc. cannot, consistently with [section 654], be punished separately."

At the sentencing hearing, a representative of First American Title Company gave a victim impact statement and explained that forged and fraudulent documents burden the lender and the current owner of the real estate, as well as the title insurance company which must accept the tender of defense for insured lenders and owners in lawsuits. In addition, forged documents "get recorded in the public records. 'Public records' meaning that they provide constructive notice to the public and people rely on those documents as such." "[M]ultiple parties down the chain of title [can be] impacted by the false or forged document."

The court — in selecting the midterm for defendant's principal term — took special note of "all the victims in this case. A lot of American dreams were destroyed and shattered, turned into nightmares. [¶] We had elderly folks, uneducated folks, folks that were trusting and hard-working members of society and in some instances take retirements and life savings only to be left in limbo or in ruin." "The court would note that many of the victims in this particular case were vulnerable, they were elderly, uneducated, naïve, limited English speakers, I will agree with [defense counsel] some of them were probably caught up in the wave of free money that was washing up on shore and thought, well, it's my turn to grab some. [¶] The money alone, about 17.5 million dollars, is off the charts. There don't appear to be any, as to the defendant herself, . . . aggravating circumstances . . . . [¶] The mitigating ones [are] that . . . as to [defendant] herself, she does have no prior record of criminal conduct. The court will also indicate that it doesn't feel that the defendant had any predisposition to do what she did, but was at least led to the trough by others. But once she got there, she ate by herself and nobody forced her to. [¶] The court will also note that she did acknowledge — whether it be remorse or wrongdoing, she acknowledged a willingness to come forth and

sit down with the district attorney's office in detail and make the discovery of . . . these crimes much easier to the prosecutor to investigate and prosecute."

The court stayed execution of sentence on defendant's conspiracy conviction pursuant to section 654. The court found that defendant's 47 convictions of grand theft and one conviction of attempted grand theft all involved divisible crimes separated by time, amounts, victims and collateral, and therefore sentenced her consecutively as to each conviction. The court also found that defendant's convictions of recording false documents all involved divisible crimes separated by time, amounts, victims and collateral, and therefore sentenced her to concurrent two-year terms. As to defendant's forgery convictions, the court sentenced her to consecutive eight-month terms for each conviction, without mentioning section 654 or the issue of multiple punishment. The court's prior statement (quoted above), however, reveals the court was cognizant of, and focused on, the diversity of victims and harms suffered in this case. As to defendant's other convictions, the court sentenced her with no mention of section 654 or multiple punishment.

Relevant Legal Principles

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

By its plain terms, section 654 bars multiple punishments of a single, physical act or omission. Fifty-two years ago, however, in *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), disapproved on a different point in *People v. Correa* (2012) 54 Cal.4th 331, 334 (*Correa*), our Supreme Court substantially enlarged the statute's scope. The *Neal* court, recognizing that few crimes result from a single physical act, adopted a test focusing on whether the defendant engaged in an indivisible course of

conduct pursuant to a single intent and objective. (*Id.* at p. 19.) In applying this test, the *Neal* court inquired whether all of the crimes were incident to one objective (*id* at p. 19) and whether one crime served as the means of perpetrating another crime (*id* at p. 20).

Over 30 years later, in *People v. Latimer* (1993) 5 Cal.4th 1203 (*Latimer*), our Supreme Court criticized the *Neal* test as a "'judicial gloss' . . . 'engrafted onto section 654'" that can defeat the statute's purpose of matching punishment with culpability. (*Id.* at p. 1211.) Nonetheless, *Latimer* declined to overrule the *Neal* test because, over the course of three decades at that point, the Legislature had incorporated the *Neal* rule into California's sentencing scheme. (*Id.* at p. 1205.) *Latimer* "stressed, however, that 'nothing we say in this opinion is intended to cast doubt on any of the later judicial limitations of the *Neal* rule.'" (*Correa*, *supra*, 54 Cal.4th at p. 336.) Recently, our Supreme Court placed another judicial limitation on the *Neal* rule (*id*. at p. 344) after recognizing that the *Neal* test "has been a subject of continuing controversy and given rise to much confusion" (*id*. at p. 335).[5]

These judicial limitations — intended to better correlate punishment with culpability — have narrowed the application of *Neal's* single intent and objective test. (*Correa*, *supra*, 54 Cal.4th at p. 341; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) Of these limitations, the following ones are relevant to the case at hand. First and fundamentally, courts avoid viewing a defendant's intent or objective too broadly or amorphously. (*People v. Perez* (1979) 23 Cal.3d 545, 552; *People v. Morelos* (2008) 168 Cal.App.4th 758, 769.) Secondly, in deciding whether a defendant harbored multiple independent objectives, courts consider, inter alia, the following factors: (1) separation in time (*People v. Beamon* (1973) 8 Cal.3d 625, 639 (*Beamon*)); (2) separate victims (*People v.McCoy* (1992) 9 Cal.App.4th 1578, 1586); (3) distinct harms (*People*

[5] *Correa* rejected dictum in a *Neal* footnote and concluded "section 654 does not bar multiple punishment for violations of the same provision of law." (*Correa*, *supra*, 54 Cal.4th at p. 344.)

v.Gangemi (1993) 13 Cal.App.4th 1790, 1800-1801); and (4) whether one crime was "the means" of committing another offense (*Neal*, *supra*, 55 Cal.2d at p. 20). Thirdly, courts have recognized the need for flexibility in applying the rule on a case by case basis: "[T]here can be no universal construction which directs the proper application of section 654 in every instance." (*Beamon*, at p. 636.) "Notwithstanding the apparent simplicity of its language, the applicability of section 654 in a particular case often involves a difficult analytical problem. [Citation.] Each case must be determined on the basis of its own facts, and general principles applicable to one type of case may not apply to another." (*In re Adams* (1975) 14 Cal.3d 629, 633; see also 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) § 129, pp. 191-192.)

"'The defendant's intent and objective are factual questions for the trial court.'" (*People v. Coleman* (1989) 48 Cal.3d 112, 162; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268 [sentencing court, not jury, determines defendant's intent and objective for purposes of § 654].) When a trial court sentences a defendant for two crimes, without suspending execution of sentence, the judge implicitly finds the acts involved more than one objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The court's findings (express or implied) are subject to the substantial evidence standard of review. (*Coleman*, at p. 162.) "'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.'" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

Finally, before turning to the specific facts before us, we review the law relevant to the two offenses of which defendant was convicted and for which she claims the benefit of section 654: forgery and grand theft. Forgery occurs when a person, with the intent to defraud, counterfeits or forges the seal or handwriting of another person. (§ 470, subd. (b).) "Forgery has three elements: a writing or other subject of forgery, the

false making of the writing, and intent to defraud." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741.) "The purpose of the statute against forgery is to protect society against the fabrication, falsification and the uttering of instruments which might be acted upon as being genuine." (*People v. Jones* (1962) 210 Cal.App.2d 805, 808-809.) "The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*Gaul-Alexander*, at p. 742.) "Unless the consequential harm of the fabrication is a loss, damage, or prejudice of a legal right, generally a pecuniary or property right, there is no harm of the kind to which the statute is directed and hence no forgery." (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 383-384.) But the "real essence of the crime of forgery . . . is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud." (*People v. Neder* (1971) 16 Cal.App.3d 846, 852-853 (*Neder*).)

Grand theft is a theft involving the taking of property worth over $950. (§ 487, subd. (a).) This offense encompasses the intent which defendant claims was her sole objective, i.e., "to steal money."

Section 654 Did Not Bar Execution of Sentence on Defendant's Forgery Crimes

Applying the foregoing principles, we conclude the court did not err by executing sentence on defendant's forgery convictions.[6] Each forgery took place at a

[6] The dozens of forgery convictions involve divergent factual scenarios. The jury convicted defendant of forging the signatures and/or seals of: (1) a notary on notary seals; (2) grantors on grant deeds and a quitclaim deed; and (3) prospective borrowers on loan applications, deeds of trust, and purchase agreements. (The jury did not convict defendant of the forgery charges in counts 12, 74, 106, and 154.) Some bank loans were for purchase money transactions, while others involved refinancing of the borrower's home. The borrower's level of knowledge and responsibility for the respective loan varied. Some borrowers intended to borrow money from a lender. Others did not agree

separate time from the related theft, affected a different victim with a disparate harm from the lender theft victim, and was not the direct and necessary means by which the theft was perpetrated.

We turn to the first factor, i.e., temporal separation. The forgeries were separated in time from the related grand theft, with the forgery preceding the theft which consisted of: (1) the funding of the respective loan and/or the loan application and (2) defendant's misappropriation of the funds.[7] Thus, defendant had ample time after

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to and were unaware of the loan accomplished with documents on which defendant forged their signatures. One forgery victim gave defendant and Gonzalez his entire savings of $87,000 and ultimately received only $25,000 back. While our opinion does not discuss the facts of each individual forgery conviction, we have reviewed the record to determine whether the offense meets the criteria for limiting application of the *Neal* rule. Although we asked the parties to submit supplemental briefing on the factual underpinnings of the various forgery and related grand theft convictions as they related to section 654, defendant failed to provide the requested facts or any analysis or argument in her supplemental opening brief and failed to submit a supplemental reply brief in response to the Attorney General's detailed supplemental respondent's brief. (*People v. Jones*, *supra*, 17 Cal.4th at p. 304 [a claim presented perfunctorily and without supporting argument will be rejected by the court in similar fashion].) Defendant has therefore waived her section 654 contention with respect to specific forgery convictions which relate to thefts from victims other than financial institution lenders.

[7] The jury convicted defendant of committing forgery and grand theft on the dates set forth in the amended information. Defendant does not challenge the sufficiency of the evidence supporting those convictions nor does she argue as to any forgery that there was no separation in time between it and the related grand theft. A judgment is presumed correct and the burden is therefore on the appellant to overcome that presumption and show reversible error. (*People v. Jones*, *supra*, 17 Cal.4th at p. 304; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

Each of defendant's forgery convictions involved a separate document, although counts 7 and 10 involved the same forgery victim on the same date with respect to the same crime. (*Neder*, *supra*, 16 Cal.App.3d at p. 852 ["forgery of several documents at the same time and in the course of one transaction constitutes a separate offense for each instrument"]; *People v. Martinez* (2008) 161 Cal.App.4th 754, 762 [§ 470, subd. (d), "is violated each time a person makes and/or passes a forged *item*, no matter how many forged *signatures* are on the item"].) In terms of the section 654 analysis, given the presumption on appeal that the judgment is correct, we cannot assume there was no temporal separation between the forgeries in counts 7 and 10.

committing each forgery to reflect on and renew her criminal intent before actually stealing money from the financial institution.

In *Beamon, supra*, 8 Cal.3d 625, our Supreme Court stated: "It seems clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*Id.* at p. 639, fn. 11.) Since *Beamon*, courts have often upheld multiple punishment for offenses separated by some period of time.

For example, in *People v. Andra*, *supra*, 156 Cal.App.4th 638, the defendant was convicted, inter alia, of identity theft and vehicle theft after she opened a credit card account in the name of the identity theft victim and used the credit card to rent a car which she failed to return to the rental car agency. (*Id.* at p. 641.) On appeal, the defendant argued she could not be punished for both crimes because she committed them with the single intent and objective of obtaining a vehicle to drive from one place to another. (*Ibid.*) The Court of Appeal rejected the defendant's contention because she committed the vehicle theft more than two weeks after obtaining the credit card. (*Ibid.*) "The weeks between the commission of these crimes afforded defendant ample opportunity to reflect and then renew her intent before committing the next crime. [Citation.] Moreover, these crimes, committed more than two weeks apart, had two different victims." (*Ibid.*)

In *People v. Frederick* (2006) 142 Cal.App.4th 400 (*Frederick*), one of the defendants started an endless chain scheme (LLDO) which promised investment returns, Mitsubishi automobiles, and "dream homes" to members who paid fees and recruited other members. (*Id.* at pp. 404-405.) On appeal the defendant contended she harbored a single intent and objective — to take money from members — and therefore could not be multiply punished for 12 grand theft convictions. (*Id.* at pp. 420-421.) The trial court found the offenses were divisible in time and gave rise to multiple violations and multiple punishment. (*Id.* at p. 420.) The Court of Appeal held that substantial evidence supported "the trial court's express ruling that the counts were divisible in time,

warranting multiple punishments." (*Id.* at p. 421.) "The grand theft counts involved specific individuals who contracted to purchase Mitsubishi automobiles . . . . The offenses concerned acts committed at different times. [Citation.] Substantial evidence supports the trial court's express ruling that the counts were divisible in time, warranting multiple punishments. [Citations.] Moreover, the trial court stated during sentencing that [the defendant's] crimes involved many victims [and] she took advantage of poor and vulnerable people . . . ." (*Ibid.*)

In sum, the separation in time factor is a well-established judicial limitation on the *Neal* rule. (*Latimer*, *supra*, 5 Cal.4th at p. 1211 [some courts "have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but *consecutive* objectives permitting multiple punishment"]; *People v. Harrison* (1989) 48 Cal. 3d 335, 338 [defendant should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior"]; *People v. Kwok, supra*, 63 Cal.App.4th at p. 1253 [offenses committed on different occasions may be punished separately]; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935 [course of conduct divisible in time may be multiply punished, particularly when defendant had opportunity to reflect and renew intent before committing next offense]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 366, 368 [one minute between defendant's gunshots gave him time for reflection and "evinced a separate intent to do violence"].)

In addition to the separation in time between defendant's forgery convictions and the respective grand thefts, her crimes injured separate victims and inflicted on them different types of harm. As to the grand thefts, defendant stole over $17 million from the lender victims. In contrast, she harmed the credit standings of her forgery victims, caused some to lose their homes and savings, jeopardized the professional reputations of her notary public victims, and clouded property title records relied on by the public. In addition to harming property rights of the forgery victims, she

violated their personal rights, by infringing on the identity, privacy, and authority of each person whose signature she forged.

Yet, defendant argues the harm she inflicted on the forgery victims was merely collateral damage "incidental to her overriding goal of obtaining money from the lenders" and contends we should disregard the harm to the forgery victims in conducting our section 654 analysis. We decline to do so. As demonstrated in *Andra* and *Frederick*, above, the existence of separate victims and harms can be a significant factor in determining whether a criminal course of conduct is divisible, even when the offenses are nonviolent.[8]

For example, in *People v. McCoy*, *supra*, 9 Cal.App.4th 1578, the defendant absconded with his three children in a child custody case. (*Id.* at p. 1582.) The appellate court found "defendant's characterization of his crimes as having a single

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[8] One type of multiple victim exception to section 654 is limited to crimes of violence, as opposed to offenses against property rights: "A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person." (*Neal*, *supra*, 55 Cal.2d at p. 20.) "Where, however, the offenses arising out of the same transaction are not crimes of violence but involve crimes against property interests of several persons, [the Supreme Court] has recognized that only single punishment is permissible. Thus, [the Supreme Court] has pointed out that the theft of several articles at the same time constitutes but one offense although such articles belong to several different owners." (*People v. Bauer* (1969) 1 Cal.3d 368, 378.) Subsequent to *Bauer*, however, our Supreme Court stated that while it continued to "adhere to that view, [it declined] to extend it to" the case where the defendant broke into three rented premises of separate tenants of one office building. (*People v. James* (1977) 19 Cal.3d 99, 119.) Demonstrating flexibility on a case by case basis, *James* stated: "If the rule were otherwise, a thief who broke into and ransacked every store in a shopping center under one roof, or every apartment in an apartment building, or every room or suite in a hotel, could claim immunity for all but one of the burglaries thus perpetrated. Nothing in the statute or case law on multiple punishment compels such an incongruous result." (*Ibid.*) In any case, defendant's forgery convictions violated personal rights of the victims, not solely their property interests.

objective of 'having sole custody of his children because he believed they were better off with him than with his wife' [was] too broad." (*Id.* at p. 1585.) "Defendant harbored three separate criminal objectives which were independent and not merely incidental to each other. His intent to violate the custody agreements as to [the three children] was personal to each child. [D]efendant's 'criminal ambition' in taking all three children was greater than had he taken only one or two." (*Id.* at p. 1586.) "Defendant's analogy to theft cases, in which a defendant 'commits only one robbery or theft notwithstanding the number of items he steals' [citation], is flawed. The inanimate objects which are the subject of property theft bear no resemblance to children who are taken from one of their parents in violation of court orders. As compared with a property crime, defendant's violation of the court orders caused a detrimental effect on three individual children for a significant period of time and repeatedly violated their mother's parental rights." (*Ibid.*)

In *People v. Gangemi*, *supra*, 13 Cal.App.4th 1790, the defendant filed several false deeds of trust with the county clerk (*id*. at p. 1800) "to unlawfully shield a friend's personal assets from collection by judgment creditors" (*id*. at p. 1793). The Court of Appeal stated: "It is no defense to assert that these acts were part of an indivisible transaction which had as its single criminal objective the illegal protection of [the friend's] property from his creditors. [S]uch an objective is too broad to satisfy the purposes of section 654." (*Id.* at pp. 1800-1801.) "Each false filing creates a separate harm to the person defrauded as well as to the integrity of the public records and the defendant may be punished for each such criminal act. Otherwise, to apply section 654 in this case would violate the law's goal of punishing violators commensurate with their criminality." (*Id.* at p. 1801.)

In *People v. Morelos*, *supra*, 168 Cal.App.4th 758, officers searched a home and found the defendants in possession of, inter alia, sheets of currency and blank checks, driver's licenses, Social Security cards, credit cards, and lists of other people's personal information (including driver's license numbers, Social Security numbers, and

potential access codes). (*Id.* at p. 761.) As to the various charges, a jury convicted one or both of the defendants of, inter alia, receiving stolen property, forgery of blank checks, forgery of altered checks, possession of forged driver's licenses, and money counterfeiting. (*Ibid.*) The trial court found the crimes "'were all for the same goal, which is financial gain,'" but sentenced the defendants consecutively because "the crimes 'all involved separate victims, separate acts, [and] separate risks to each of the victims.'" (*Id.* at p. 769.) On appeal the defendants argued they could be punished for only one of their "'possession-related' counts (the receiving counts, the blank check counts, the driver's license counts, and the altered check counts)" because they engaged in an indivisible transaction toward a single objective. (*Id.* at p. 768.) The Court of Appeal affirmed the consecutive sentences, stating that to consider the defendants' "counterfeiting and forgery operation as 'essentially a single act of "possession" as to all counts' would adopt that impermissible 'broad and amorphous view.'" (*Ibid*.)

Our entire discussion above illustrates the overriding concern in a case like this that the defendant's intent and objective for purposes of the *Neal* test not be defined overbroadly in light of the perpetrator's culpability. Here, defendant's culpability is magnified by the number of victims she knowingly harmed, including vulnerable persons she defrauded in a cold and mercenary way. "A grand criminal enterprise is more deserving of censure than a less ambitious one, even if there is only one ultimate objective." (*Latimer*, *supra*, 5 Cal.4th at p. 2011.) To characterize her intent and objective as simply to steal money is overbroad and amorphous. (*People v. Perez*, *supra*, 23 Cal.3d at p. 552 ["Assertion of a sole intent and objective to achieve sexual gratification is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.] It would reward the defendant who has the greater criminal

ambition with a lesser punishment"]; *People v. Lochmiller* (1986) 187 Cal.App.3d 151, 153-154 [robber who "commits several robberies and claims he had one objective, to gain money," may be "multipl[y] punish[ed] for separate crimes" where each act is "'committed with a separate identifiable intent and objective'"]; *Neder*, *supra*, 16 Cal.App.3d at pp. 854-855 [defendant properly punished for three forgery counts for using stolen credit card to charge purchases in three different departments in same store on same day; criminal objective should not be defined too broadly].) Defendant's forgery commissions entailed separate intents and objectives from her desire to steal money by perpetrating grand theft. With each forgery, she sought to defraud the respective lender into acting upon the forged document as though it were genuine. She sometimes intended to defraud the forgery victims by signing their names without authority. She knowingly put forgery victims at risk of losing their homes, savings, creditworthiness, and/or professional standing.

A related way of applying the *Neal* test is to ask whether the defendant committed one crime solely as the means necessary to accomplish another offense. Here, defendant's forgeries cannot be minimized as simply the incidental means of stealing money from lenders. In the instances where defendant stole money from lender financial institutions, she submitted loan applications as the requisite means of stealing the money. But when she forged signatures and seals on documents, she took an extra step that was not an essential component of the loan application process and her subsequent misappropriation of money.

Defendant argues otherwise, relying on forged check cases — *People v. Rosenberg* (1963) 212 Cal.App.2d 773, *People v. Curtin* (1994) 22 Cal.App.4th 528, *People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679, and *People v. Hawkins* (1961) 196 Cal.App.2d 832 — to assert that her forgeries "constituted a mere means of perpetrating [the more serious crime of] grand theft, pursuant to a single, criminal objective." The cases are distinguishable. *Reisdorff* held that the defendant could not be convicted of

both forgery and possession of a completed check with intent to defraud because the latter offense is *necessarily included* within the crime of forgery by uttering. (*Reisdorff*, at p. 679.) Similarly, in *Hawkins*, the defendant was convicted of two closely related crimes — issuing a fictitious check and forging a fictitious name — for his act of making a purchase with a forged check. (*Hawkins*, at p. 834.) In *Rosenberg*, a sparse opinion, the defendant pleaded guilty to grand theft and forgery of a fictitious name based on his purchase of a television set with a fictitious check. (*Rosenberg*, at pp. 774-775.) By pleading guilty, "the defendant, at least prima facie, admitted that the crimes were separate and not indivisible." (*Id.* at pp. 775-776.) Nonetheless, the appellate court, based on the probation report's factual summary, found "the use of the check and the taking of possession of the television set were parts of a continuous course of conduct and were motivated by one objective, the theft of the set, the use of the check being incident to and a means of perpetrating the theft." (*Id.* at p. 777.) In *Curtin*, again a sparse opinion, the defendant stole money from a bank by cashing a forged check there. (*Curtain*, at p. 530.) *Rosenberg* and *Curtin* are distinguishable from the case at hand because: (1) there was no evidence the forgery and the theft were separated by a period of time as opposed to occurring virtually simultaneously; and (2) the forgery was a necessary element of the theft, since a cashing of, or purchase made with, a valid check would not constitute theft.[9] Here, in contrast, defendant's thefts resulted from her

[9] "[T]he formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the single crime of 'theft' defined by Penal Code section 484 . . . ." (*People v. Davis* (1998) 19 Cal.4th 301, 304.) The elements of larceny by trick or device are "a taking of something belonging to another and an asportation of the thing taken with an intent permanently to deprive the owner of his property." (*People v. Kagan* (1968) 264 Cal.App.2d 648, 658-659.) The gist of theft by embezzlement "is the appropriation to one's own use of property delivered [generally to a fiduciary] for devotion to a particular purpose other than one's own enjoyment of it." (*Id.* at p. 659.) "Third, as to theft by false pretenses, it must be shown that the defendant made a false representation or false promise with the intent to

misappropriation of loan proceeds; forgery was not a necessary element of the theft offense.

Finally, defendant relies on *People v. Kenefick* (2009) 170 Cal.App.4th 114, where the Court of Appeal held the defendant could not be punished separately for two forgery convictions involving the victim, Donald Howard, "because the forgeries were part and parcel of the theft, securities fraud, and burglary" and the defendant "had a single criminal intent — to take [Howard's] money." (*Id.* at pp. 118, 124.) But in *Kenefick*, it appears the defendant had only one intent and only one victim, i.e., Howard, with respect to the forgery convictions at issue. The simple facts were: Howard invested $60,000 in the defendant's investment company, believing the money was secured by a deed of trust on real property. (*Id.* at p. 117.) In reality, the deed of trust was fraudulent. (*Ibid.*) The owners of the real property had *not* borrowed money from the defendant's investment company; their signatures on the deed of trust were forged. (*Ibid.*) Moreover, there is no suggestion in *Kenefick*: (1) that the fraudulent deed of trust had been recorded, or had any effect on the property owners or their property; (2) that the defendant harmed the property owners; or (3) that the defendant had any intention as to the forgery other than her objective to persuade Howard to invest in her investment company. Thus, it does not appear the defendant in *Kenefick* harmed the credit, reputation, home ownership,or savings of the property owners nor did she affect the public recordation system.

The court did not err by executing sentence on defendant's forgery convictions.

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defraud the owner of his property, and that the owner was in fact defrauded in that he parted with his property in reliance upon the representation." (*Ibid.*)

The Court Did Not Err by Declining to Instruct the Jury That Certain Borrowers Were Accomplices as a Matter of Law

Defendant argues that three borrowers — Luis Astudillo, Fidel Carrera, and Samar Nesheiwat — were equally as culpable as her, because they knew the lender banks would rely on misrepresentations of their income and assets and other false statements in the loan documents. She concludes: (1) these borrowers were accomplices as a matter of law; (2) their testimony required corroboration under section 1111; and (3) the court erred by instructing the jury to decide whether these borrowers were accomplices.

Background

The People called Astudillo to testify concerning counts 56 (grand theft), 57 (forgery of official seal), and 58 (grand theft). Astudillo lived on East Broadway in Anaheim and owned the house with his mother. Defendant, Gonzalez, and another person talked with Astudillo and his mother about making a profit by "flipping" houses, i.e., by buying and quickly selling homes. Astudillo and his mother knew they would have to refinance their Anaheim home and "pull cash" in order to buy other houses to flip. Astudillo told defendant and Gonzalez that he wanted a loan with a fixed rate and did not want his payment to go up.

Around that time, Astudillo lost his job. Gonzalez told him to obtain a business license as a handyman in order to apply for a stated income loan. In reality, Astudillo did not have a handyman business. Defendant and Gonzalez had Astudillo and his mother sign papers; defendant flipped through the pages of the documents without offering any explanation of them. Astudillo had no opportunity to read the documents. The loan application falsely stated Astudillo's income was $9,500 per month. Astudillo gave defendant and Gonzalez the proceeds from this first refinancing loan to use the money "to invest in the homes."

When Astudillo received the statement for the first refinancing loan, he was shocked to see the monthly payment was $3,000. (Prior to refinancing the home, the payment had been $1,500 a month.) Astudillo and his mother complained to defendant and Gonzalez about the high payment. Defendant and Gonzalez told them to refinance their home again to lower the payment. Astudillo testified that, contrary to statements in the second loan application, he did not have a handyman business, monthly income of $15,000, assets of over $1.5 million, or $500,000 of life insurance.

Astudillo never received any money back from defendant or Gonzalez. He never agreed that defendant and Gonzalez could use the money for their own purposes.

On cross-examination, Astudillo admitted that when he signed the papers for the first refinancing loan, he knew he did not qualify for it. He was therefore aware that some false information would necessarily be given to the bank.

The People called Carrera to testify concerning counts 59 (grand theft), 60 (grand theft), 64 (grand theft), and 87 (grand theft). Carrera refinanced his home to obtain cash to buy and sell houses. Defendant and Gonzalez had him sign papers. The loan application contained false information, including that Carrera owned an auto company, made $1,500 a month, and had assets of $655,000. Carrera gave part of the loan proceeds to defendant and Gonzalez, who were supposed to use it "to buy property, fix it up and re-sell it." Defendant diverted this money to her personal use.

At the advice of defendant and Gonzalez, Carrera refinanced his home again to get a better interest rate. The documents for this second refinancing contained false information as to his income and assets. Carrera also signed documents to buy two investment houses; the documents, presented to him by defendant and Gonzalez, contained false information about his income and assets. Carrera never told defendant she could use over $116,000 of the refinancing loan proceeds for her own purposes, or over $25,000 from a purchase loan for her own purposes.

On cross-examination, Carrera admitted that he knew the three banks would not have lent him a total of over $1 million unless the loan paperwork contained lies. Defendant did not, however, explain the documents to Carrera, and Carrera did not read them.

The People called Nesheiwat to testify concerning counts 67 (grand theft), 71 (grand theft), and 72 (identity theft). Gonzalez told Nesheiwat (who was then a substitute teacher, married, and had a son) that it was possible to buy a house with 100 percent financing. Gonzalez also assured Nesheiwat that if Nesheiwat could not pay the whole mortgage payment, Gonzalez would take care of any balance. In late 2005, Nesheiwat obtained a real estate broker license. In late 2005 or early 2006, defendant and Gonzalez had him sign papers to buy a house in Victorville. Nesheiwat did not read the documents. The loan application contained false information about Nesheiwat's income and assets. Unbeknownst to him, the documents he signed also contained a loan application for a second house (this one in Apple Valley). On cross-examination, Nesheiwat admitted he knew he did not qualify for the loan on the home in Victorville that he knowingly bought.

After listening to counsels' arguments, the court ruled that the question of whether the three witnesses were defendant's accomplices would be left to the jury and therefore the court would instruct the jurors with CALCRIM No. 334. Accordingly, the court instructed the jury: "Before you may consider the testimony of [Astudillo, Carrera, and Nesheiwat, as well as other borrower witnesses], as evidence against the defendant regarding the crimes of [conspiracy, grand theft, forgery, identity theft, theft from elder, and forgery of official seal], you must decide whether [those witnesses] were accomplices to those crimes. [¶] A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime, or if: [¶] One, he or she knew of the criminal purpose of the person who committed the crime; [¶] And two, he or she

intended to and did, in fact, aid, facilitate, promote, encourage or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime." The court further instructed the jurors that if they decided that a witness was an accomplice, they could not convict the defendant of conspiracy, grand theft, forgery, identity theft, theft from elder, or forgery of official seal based on that witness's testimony alone.

The court properly ruled the witnesses were not accomplices as a matter of law.

"'An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant . . . .' [Citation.] This definition includes all principals in a criminal act (i.e., '[a]ll persons concerned in the commission of a crime' [citation]) but does not include accessories (i.e., '[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony' [citation])." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960 (*Tewksbury*).) "The fact that 'the witness was prosecuted for the same offense as defendant does not alone establish [the witness] to be an accomplice [as a matter of law].'" (*Ibid.*) A person who aids in the commission of a crime is not necessarily an accomplice. (*Ibid.*) "Criminal liability as a principal attaches to those who aid in the commission of a crime only if they also share in the criminal intent [citation] or, in the language of section 31[,] abet the crime." (*Ibid.*) A person was "an accomplice only if at the time she acted she had 'guilty knowledge and intent with regard to the commission of the crime.'" (*Ibid.*) "The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

"[W]hether a witness is an accomplice is a question of fact for the jury in all cases unless 'there is no dispute as to either the facts or the inferences to be drawn therefrom.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271 (*Hayes*).) But when the

undisputed evidence "establishes as a matter of law that the witness was an accomplice, the court must so instruct the jury . . . ." (*Ibid.*)

In *Tewksbury*, the defendant was convicted, inter alia, of robbing two restaurant employees. (*Tewksbury*, *supra*, 15 Cal.3d at p. 956.) Our Supreme Court held the trial court did not err by failing to instruct the jury that a witness named Mary was an accomplice as a matter of law. (*Id.* at p. 962.) Although it was undisputed that Mary aided the defendant by phoning the restaurant to see when its kitchen closed, by supplying an accomplice of the defendant with pencil and paper to draw a diagram of the restaurant, "and by driving some of the principals to a point of rendezvous in the vicinity of the crimes, such actions [did] not confer upon her accomplice status unless she also acted with the requisite guilty intent. She need not have actually had the specific intent to commit a robbery however; the intent requirement [was] satisfied if [she], prior to its commission, realized that a robbery was being planned and that she was facilitating its commission." (*Id.* at p. 960.) Our Supreme Court found Mary's testimony reasonably supported "the finding that she acted without guilty knowledge prior to the actual perpetration of the robbery and that she did not ever realize that she was aiding in its commission until after it had been accomplished . . . ." (*Id.* at p. 962.)

In *Hayes*, the evidence established that a witness named Garcia "carried out tasks preliminary to the murders, drove the victims to the location at which they were killed, and lulled them by performing the weapons search during which [the defendant] shot them." (*Hayes*, *supra*, 21 Cal.4th at p. 1271.) "Garcia's status as an accomplice turn[ed] on whether as a direct perpetrator, conspirator, or aider and abettor, she was aware that [the victims] were to be killed, or was engaged that way in any other crime the foreseeable result of which might be murder." (*Ibid.*, fns. omitted.) Although "[t]here was strong circumstantial evidence that Garcia was an accomplice in the murders," this did "not compel a conclusion that she was an accomplice." (*Id.* at pp. 1271-1272.)

"[A]ccomplice status is a jury question unless there can be no reasonable dispute as to the facts or the inferences to be drawn therefrom." (*Id.* at p. 1272.)

Here, Astudillo, Carrera, and Nesheiwat acted with the requisite criminal intent only if (1) they knew defendant planned to commit grand theft, identity theft, or forgery of an official seal, and (2) they knew they were facilitating the crime. The evidence showed: (1) these witnesses knew they did not qualify for the loans in question and that the applicable paperwork would necessarily contain falsehoods; and (2) they contracted with the lenders for the loans and obligated themselves to repay the lenders. The evidence did *not* show: (1) these witnesses knew of defendant's plan to illegally retain part of the loan proceeds for her personal benefit; or (2) these witnesses themselves intended to steal money from the lenders, i.e., to permanently deprive the lenders of repayment of the loans. Defendant argues it is "a distinction without a difference" that these borrowers "intended to benefit themselves," rather than her, because they still "had the same basic or general intent as [her], namely to obtain money from the respective lenders through false statements on loan applications." But all borrowers intend to benefit themselves by obtaining money from the respective lender. False statements in a loan application, without more, does not necessarily constitute grand theft.

The court did not err by determining the three borrowers in question were not accomplices as a matter of law.

The Court Did Not Abuse Its Discretion by Allowing the Prosecution to Amend the Information During Trial

Defendant contends the court erred by allowing the People to amend the information after the commencement of trial to add 14 counts against her relating to offenses that took place in 2005.

In fact, the People amended the information merely to add a new theory for tolling the statute of limitations, not to add 14 new counts. The counts in question were

included in the felony complaint, as well as in the original information, and repeated in the amended information.

Prior to trial, the prosecution notified the court and the defense that the People "would be filing a First Amended Information and what the issues would be." Trial commenced on March 30, 2010. On April 7, 2010 the prosecution filed points and authorities in support of its motion to amend the information pursuant to section 1009. The purpose of the amendment was to toll the statute of limitations by alleging that defendant was in Mexico from July to December of 2007. (§ 803, subd. (d) [time period when defendant is out of state not counted toward limitations period].) The allegation was based on Investigator Frazier's preliminary hearing testimony that defendant said she stopped payment on all the properties in July 2007, and went to Mexico for about six months, because she was being threatened with a civil lawsuit. The proposed amendment would also revise the information's existing allegation that the statute of limitations was tolled based on the theory of delayed discovery. The court granted the defense additional time to review the People's motion.

At a hearing after the close of evidence at trial, the court and the prosecutor agreed that the statute of limitations tolling argument concerned only the charges relating to the properties located on Magnolia Street, Garden Grove (counts 11-14); Reading Avenue, Garden Grove (counts 23-26); Chisholm Trail, Victorville (counts 65, 66); High Desert (counts 100-104)[10]; and Nolina Drive, Hesperia (counts 105-106).

The court — having listened to counsels' argument and having reviewed the moving and opposition papers and some preliminary hearing transcript pages — found sufficient evidence was presented at the preliminary hearing to permit the People to amend the information and that defendant's substantial rights were not compromised

[10] According to the first amended information, the actual address of the property related to counts 100 through 104 is on Redwood Avenue, Hesperia.

or prejudiced thereby. The court independently found that the People had presented sufficient evidence to amend the information to conform to proof.

Section 1009 permits a court to allow an information to be amended at any stage of the proceedings, so long as the defendant's substantial rights are not prejudiced thereby and the amended information does not charge an offense not shown by the evidence taken at the preliminary examination. A trial court's decision under section 1009 is reviewed for an abuse of discretion. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 458.)

Defendant contends Investigator Frazier's preliminary testimony about her absence from California in 2007 was "cryptic" and there was no indication the testimony related to tolling the statute of limitations. She argues that although the prosecution asserted "from the outset that the statute of limitations had been tolled, [it] did so based on an *entirely different theory*, namely delayed discovery under . . . sections 801.5 and 803, subdivision (c)." She contends the purpose of section 1009 "is to afford notice to the defendant of the nature of the charges that he or she is facing, and to give him or her a fair opportunity to defend them at trial." She concludes the amendment violated section 1009 by changing the charged offenses, charging offenses not shown by the preliminary hearing evidence, and prejudicing her substantial rights.

The court did not abuse its discretion by allowing the amendment. As to section 1009's evidentiary requirement, Investigator Frazier testified at the preliminary hearing about the offenses in question. Nor were defendant's substantial rights prejudiced by the amendment of the information. Even the felony complaint notified defendant of the charges in question and alleged the statute of limitations was tolled based on delayed discovery. (Defendant does not contend the delayed discovery basis for tolling the statute of limitations lacked merit.) Investigator Frazier testified at the preliminary hearing concerning defendant's absence from the state in 2007. Further

evidence of her 2007 absence from California was presented at trial. Defendant had ample notice of the charges and was not prejudiced in defending against them.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.